United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-7132

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES JAMES,

Plaintiff-Appellee,

-against-

BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the Towns of ADDISON, CAMERON, RATHBONE, TUFCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISPEO; STEUBEN COUNTY, New York; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants-Appellants.

On Appeal From the United States District Court for the Western District of New York

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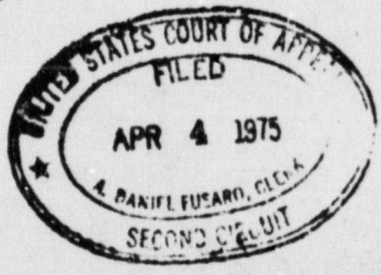
BRIEF FOR PLAINTIFF-APPELLEE



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Questions Presented

1. Was the decision of the court below granting back-pay to plaintiff-appellee clearly erroneous?

2. Was the decision of the court below to tax pre-judgment interest pursuant to New York law and to award reasonable attorneys' fees to plaintiff-appellee a permissible exercise of discretion?

INTRODUCTORY MATERIAL

A. The Procedural History of this Litigation

On November 14 and December 12, 1969, Charles James, an 11th grade English teacher at Addison High School, wore an unadorned black cloth armband on the sleeve of his jacket as an expression of his concern over widespread loss of life in Vietnam. When James refused the demands of defendants-appellants to remove the armband, he was summarily suspended from his teaching duties on December 12, 1969 and was fired on January 13, 1970. After unsuccessfully exhausting an administrative appeal to the New York State Commissioner of Education, James on April 14, 1971, commenced this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, challenging the constitutionality of his dismissal. After both sides had moved for summary judgment, Judge Burke dismissed James' complaint on December 23, 1971. On May 24, 1972, a panel of this Court, consisting of Chief Judge Kaufman and Judges Anderson and Mansfield, unanimously reversed the dismissal of James' complaint and ruled that his dismissal for wearing the armband had been unlawful

unless deferdants were able to satisfy the evidentiary burden of demonstrating that the armband had "materially" and "substantially" jeopardized the orderly educational processes at Addison High School. James v. Board of Education, 461 F.2d 566 (2d Cir. 1972) cert. denied, 409 U.S. 1042 (1972), rehearing denied, 410 U.S. 947 (1973). On July 3, 1972, defendants' petition for rehearing en banc was denied. On August 12, 1972, Judge Curtin, after an adversary hearing, granted preliminary injunctive relief reinstating James as an English teacher at Addison High School for the 1972-1973 school year. Defendants initially "reinstated" James by assigning him to supervise six study halls and one lunch period. When counsel protested the failure to assign James to academic classes, defendants assigned James two academic classes (one of which was a Public Speaking class consisting of two students), four study halls and one lunch period. At the close of the 1972-1973 school year, defendants, once again, dismissed James -- this time allegedly on the basis of his failure to have persuaded them of his

fitness to receive tenure.[1] With James' second dismissal, it became evident that a satisfactory resolution of this controversy would not be possible without further resort to the courts.[2] Accordingly, on October 9, 1973, James moved for summary judgment for the back wages due him from his unlawful dismissal on January 13, 1970 until his reinstatement on August 12, 1972. After hearing oral argument, Judge Burke recused himself on the ground that

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1. The issues raised by James' second dismissal are currently pending before Judge Curtin in James v. Board of Education (Civ. Action No. 74-175) and, thus, are not implicated in this appeal. Briefly put, James argues that his second dismissal was a thinly-veiled attempt to punish him for the armband incident and that, in assigning him an absurdly truncated teaching schedule, defendants made it impossible for him to demonstrate his teaching abilities. James also raises a serious procedural due process issue, since he was excluded from the Board hearing at which the tenure decision was reached. At Judge Curtin's suggestion, counsel has explored the possibility of utilizing a hearing before the Commissioner of Education as an alternative forum to resolve James II. The Commissioner's office has requested counsel to defer presenting James II until the legality of the dismissal in James I has been finally adjudicated. Hopefully, upon the final adjudication of this appeal, the Commissioner will act in James II, thus avoiding the necessity for further litigation.

2. Until his second dismissal, James clung to the hope that his concededly placid return to school in September, 1972, pursuant to Judge Curtin's preliminary injunction, and his good faith attempt to carry out the bizarre teaching program assigned to him, would induce defendants to permit him to resume his teaching career without further incident.

he would be unable to afford James an impartial hearing and ordered the case transferred to Chief Judge Henderson's calendar. Chief Judge Henderson immediately directed a re-argument of James' motion in November, 1973, shortly before Chief Judge Henderson's death. After Chief Judge Henderson's death, James' motion was referred to Judge Curtin who informed counsel that he would defer consideration of James' motion for summary judgment until defendants were given a full opportunity to prove that James' armband had caused a substantial and material disruption of the educational process. Accordingly, a plenary trial was held before Judge Curtin on July 9, 10 and 11, 1974, at which defendants attempted to demonstrate that James' armband was sufficiently disruptive to satisfy the evidentiary burden placed upon them by James v. Board of Education, 461 F.2d 566 (2d Cir. 1972). At the close of the trial, Judge Curtin explicitly found that not only had defendants failed to meet their evidentiary burden, but that the evidence compelled a finding that no disruption whatever occurred or was reasonably foreseeable as a result of James' armband. Therefore, on November 20, 1974, he entered judgment for James in the amount of $20,964.25, representing James' net salary loss for the period from the date of his

unlawful dismissal (January 13, 1970) to the date of his reinstatement pursuant to Judge Curtin's preliminary injunction (August 12, 1972). In addition, Judge Curtin awarded costs and reasonable attorneys' fees to James. On November 27, 1974, James moved to amend the judgment to clarify the award of attorneys' fees and to add appropriate pre-judgment interest. On January 30, 1975, Judge Curtin granted James' motion and awarded appropriate pre-judgment interest pursuant to the New York law. On March 11, 1975, a panel of this Court denied James' application for summary affirmance without prejudice and scheduled an expedited hearing on this appeal.

B. The Scope of Review of Judge Curtin's Findings of Fact and Conclusions of Law

1. Judge Curtin's Application of the Controlling Legal Principles Enunciated in Chief Judge Kaufman's Earlier Opinion

In seeking to apply the principles of law enunciated by Chief Judge Kaufman in James v. Board of Education, 461 F.2d 566 (2d Cir. 1972), Judge Curtin was, of course, carrying out the mandate of this Court. While this Court, on appeal, possesses the theoretical power to modify, or even reverse, those principles, settled notions of finality,

expressed under the rubric of "law of the case", dictate that the governing legal principles enunciated by this Court in a prior phase of this litigation be respected, unless deemed to be clearly erroneous.[3] E.g. Smith v. Vulcan Iron Works, 165 U.S. 518, 525-526 (1897); Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973); Wharton v. Hirsch, 348 F.2d 906 (2d Cir. 1965); Mid-Eastern Electronics, Inc. v. First National Bank of Southern Maryland, 455 F.2d 141 (4th Cir. 1970); Trice v. Commercial Union Assurance Co., 397 F.2d 889 (6th Cir. 1968). See, generally Vestal, "Law of the Case": Single-Suit Preclusion, 1967 Utah L. Rev. 1. For extensive litigation of the meaning of "law of the case" in the Fifth Circuit, see, Terrell v. Household Good Carrier's Bureau, 494 F.2d 16 (5th Cir. 1974); Fidelity and Deposit Company of Maryland v. Usaform Hail Pool, Inc., 463 F.2d 4 (5th Cir. 1972); and Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970). In Molpus, an earlier phase of the litigation had enunciated legal principles governing the invitation of speakers to the University of Mississippi, 306 F. Supp. 963 (N.D. Miss.

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3. As appellee demonstrates, infra, at 10-16, far from being clearly erroneous, the principles developed by Chief Judge Kaufman in James have been unanimously accepted and successfully applied.

1969). In an appeal from a subsequent application of those principles, the Fifth Circuit noted that its role was

> "... now even more restricted. Rather than going into all the fascinating free speech issues that plaintiffs argue...we are confined to the more prosaic task of deciding whether the finding...is clearly erroneous." 432 F.2d at 921.

The reviewing function of this Court with respect to the legal principles enunciated in the first James appeal is likewise "confined to the more prosaic task" of determining whether those principles are clearly erroneous.

2. Judge Curtin's Findings of Fact

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses..."

Thus, Judge Curtin's meticulous findings of fact, made after a three day trial during which he was afforded a full opportunity to "judge of the credibility" of the principal participants in this litigation, must be respected by this Court unless found to be "clearly

erroneous" within the meaning of Rule 52(a).[4] E.g., United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (defining "clearly erroneous" as requiring a "definite and firm conviction that a mistake has been committed"); Zenith Radio Corp. v. Hazeltime Research Inc., 395 U.S. 100 (1969) (applying "clearly erroneous" standard to findings of fact made by district court without a jury); Commissioner v. Duberstein, 363 U.S. 278 (1960) (applying "clearly erroneous" test to factual inferences drawn by the trial court from undisputed facts). See also, Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

The "clearly erroneous" standard has been consistently applied to uphold findings of fact made by trial courts in determining whether a given exercise of First Amendment rights by a teacher "materially" and "substantially" jeopardized the interest in discipline or sound education. E.g. Birdwell v. Hazelwood School District, 491 F.2d 490 (8th Cir. 1974) (applying "clearly erroneous" standard to uphold district court finding that

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4. Since Judge Curtin's findings were premised upon overwhelming and substantially uncontradicted evidence, it is somewhat academic to dwell upon the restrictive review to which they are subject. Appellee submits that under any standard known to the law -- including reasonable doubt -- Judge Curtin's findings would be upheld.

teacher's speech had been "infused with the spirit of violent action" and had created a "reasonable apprehension of disruption"); Sinard v. Board of Education, 473 F.2d 988 (2d Cir. 1973); Cole v. Choctaw Board of Education, 471 F.2d 777 (5th Cir. 1973); Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973); and Coalition for Education in District 1 v. Board of Education of New York, 495 F.2d 1090, 1093 (2d Cir. 1974).

Thus, unless this Court 1) believes Judge Curtin's findings of fact and the inferences he drew from the uncontested facts to have been clearly erroneous; and 2) believes the legal principles enunciated in James v. Board of Education, supra, to have been clearly erroneous, it should affirm the judgment of the District Court.

C. Counter-Statement of the Case

The attention of the Court is respectfully invited to Judge Curtin's extensive findings of fact which accurately reflect the events in question. Appellee has prepared as an Appendix to this brief an annotated copy of Judge Curtin's opinion with citations to the portion of the transcript which support each finding.

ARGUMENT

I. DEFENDANTS-APPELLANTS VIOLATED JAMES' CONSTITUTIONAL RIGHTS BY SUMMARILY DISMISSING HIM FOR WEARING A BLACK ARMBAND TO CLASS

A. The Dismissal Violated James' Free Speech Rights

In James v. Board of Education, 461 F.2d 566 (2d Cir.) cert. denied, 409 U.S. 1042 (1972), rehearing denied, 410 U.S. 947 (1973), this Court stated:

> "...the issue in this case is whether, in assuming the role of judge and disciplinarian, a Board of Education may forbid a teacher to express a political opinion, however benign and noncoercive the manner of expression. We are asked to decide whether a Board of Education, without transgressing the first amendment, may discharge an 11th grade English teacher who did no more than wear a black armband in class in symbolic protest against the Vietnam War, although it is agreed that the armband did not disrupt classroom activities and as far as we know did not have any influence on any students and did not engender any protest from any student, teacher or parent. We hold that the Board may not take such action." 461 F.2d at 568.

Chief Judge Kaufman announced the above-quoted holding on May 24, 1972. In the almost three years which have elapsed since James was decided, defendants-appellants have systematically sought to avoid the

clear command of this Court. Despite the lack of any serious dispute concerning the facts of this case,[5] defendants persisted in urging that factual issues concerning the extent of the disruption caused by James' armband remained to be litigated in a plenary trial. Bowing to defendants' insistence that issues of fact existed, Judge Curtin declined to grant summary judgment and provided defendants with a three day plenary trial after which he made detailed findings of fact wholly rejecting the notion that any disruption had occurred or was threatened. Nevertheless, defendants-appellants have prolonged this litigation by appealing from Judge Curtin's findings on the ground that they are not supported

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5. The lack of any serious dispute over the facts was revealed by cross-motions for summary judgment before Judge Burke as early as September 1971 and was the subject of repeated observations by the courts. E.g. May 24, 1972, 461 F.2d at 568 ("The facts essential to a resolution of the conflicting interests are undisputed"); August 12, 1972, 87a-89a ("Although counsel for the defendants argues that issues of fact remain, he was unable to specify at oral argument what those issues are"); November 20, 1974, 385 F. Supp. at 211 ("Many of the facts in this case are undisputed by the parties. None of the essential facts which Judge Kaufman gleaned from the papers submitted on the motions was contradicted by the evidence at trial.").

by the weight of the evidence.[6]

Apparently, it is defendants' view that James' armband, while creating no observable, measurable, disruption, posed an invisible, unmeasurable, interference with their view of sound education and that such purely subjective, non-quantifiable "disruption" justified James' dismissal.[7] In effect, defendants insist that James' armband was per se disruptive and that the equivocal conclusory assertions of their experts to that effect must be automatically rubber-stamped by the Federal courts.

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6. Such an assertion, given the record below, is simply incredible. Judge Curtin noted that:

> "Although defendants' witnesses alluded to disruption, it is apparent that the classroom activity at the Addison High School continued at a serene pace throughout these Moratorium Days and that there was neither actual disruption nor the slightest threat of it. At best any threat of disruption was ephemeral and, in the words of Dr. Terino, "an internal one".
> 385 F. Supp. at 215; Appendix, 797a.

7. Defendants' assertion that they alone are able to perceive the phantom disruption, even though Dr. Kenneth Clark, one of the nation's most distinguished educational psychologists, was unable to find it, is reminiscent of Big Julie's assurance to Sky Masterson in "Guys and Dolls" that shooting craps with blank dice was not unreasonable, since Big Julie remembered where the numbers were. If defendants' theory of phantom inherent disruption were accepted, only educational bureaucrats would be able to tell us where the numbers are.

However, the theoretical musing by defendants' experts on the appropriate educational philosophy which James should or should not have espoused is precisely the type of highly disputable "abstraction" which this Court has already condemned as insufficient as a matter of law to justify a suppression of First Amendment activity.[8]

To recognize the "abstractions" put forward below by defendants as sufficient to justify the dismissal of Charles James would be to sanction the use of "expertness as a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from

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8. Chief Judge Kaufman phrased the need for "facts" as opposed to "abstractions", as follows:

> "Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized..." 461 F.2d at 571 (emphasis added).

The disputable nature of defendants' experts'abstract conclusion that the armband caused "inherent disruption" is made manifest by the diametrically opposed views on the subject advanced by Dr. Kenneth Clark. Dr. Clark testified unequivocally that, under the facts of this case, the armband was not disruptive of the learning process. Appendix, pp. 243a-250a.

review."[9] 461 F.2d at 575.

The insistence of this Court in James that any suppression of a teacher's First Amendment rights be justified by objective facts indicating a serious disruption of the orderly educational process[10] has been uniformly and successfully applied by the courts in striking the delicate balance between the First Amendment and the legitimate concerns of educational officials. Whenever objective facts (as opposed to subjective jargon) justify a finding of disruption, a teacher's speech has been deemed unprotected. E.g. Birdwell v. Hazelwood School District, 491 F.2d 490 (8th Cir. 1974) (teacher's denunciation of ROTC "infused with a spirit of violent action" held unprotected while conceding that mere armband would have been protected, 491 F.2d at 494); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) (insistence upon utilizing classroom time for teaching sex education not in curriculum held unprotected). However, whenever the

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9. Quoting from C. Jaffe, Judicial Control over Administrative Action, 613 (1965).

10. The James standard follows closely the guidelines suggested by the Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968) and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), which, in turn, drew on the experience of the Fifth Circuit in Burnside v. Byars, 363 F.2d (5th Cir. 1966) and Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966).

objective facts indicate that a teacher's First Amendment activities posed no real threat to the orderly operation of the educational process and were neither coercive nor inflammatory, they have been deemed constitutionally protected. E.g. Russo v. Central District No. 1, 469 F.2d 623 (2d Cir. 1972) (refusal to lead flag salute protected in absence of showing of disruption); Gieringer v. Central School District No. 58, 477 F.2d 1164 (8th Cir. 1973) (criticism of Board protected); Acanfora v. Board of Education of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (open avowal of homosexuality protected); Moore v. Gaston County Board of Education, 375 F. Supp. 1037 (W.D. N. Car. 1973) (classroom discussion of personal agnosticism protected); Mabey v. Reagan, 376 F. Supp. 216 (N.D. Cal. 1974) (factual basis for disruption required). See also, River Dell Education Association v. River Dell Board of Education, 122 N.J. Super. 350, 300 A. 2d 361 (1973) (requiring factual basis to be shown in order to suppress teacher's First Amendment activity); Adcock v. Board of Education of San Diego Unified School District, 109 Cal. Rptr. 676, 513 P.2d 900 (1973).

Applying the James standard to the facts of this case, Judge Curtin held:

> "In this case, the defendants have fallen far short of their burden of proving that the interest of discipline or sound education was materially and substantially jeopardized...[W]hat is essential for the defendants to carry their burden of proof is some sort of showing of actual educational or disciplinary disruption. The defendants have not offered any such proof. Testimony about some vague internal disruptions or alleged acts of "poor pedagogy" will not suffice." 385 F. Supp. at 216, Appendix, pp. 797a-798a.

Since appellants have failed utterly to meet their evidentiary burden, Judge Curtin's conclusion that James' armband was constitutionally protected should be summarily affirmed and appellants should be directed to pay James the back-wages awarded below forthwith.

B. The Dismissal Violated James' Free Exercise Rights

In James v. Board of Education, supra, this Court has already ruled that, on the facts of this case, the wearing of a black armband by Charles James was protected against governmental sanction by the free speech guaranty of the First Amendment. Moreover, given the Quaker genesis of the armband and James' history of deep religious attachment, his act was protected by the free exercise clause of the First Amendment as well.

After attending Colgate-Rochester Divinity School and serving as a Methodist minister, James' deeply held views on the value of human life led him to an increasing identification with the Society of Friends.[9] By 1969, he had been regularly attending Friends Meetings, first at the Flushing Meeting and then at the Elmira Meeting, for over two years. The armband which James wore to class, and which precipitated this action, was prepared by the members of the Elmira Meeting and worn by them as an expression of their religious aversion to all war and as an expression of anguish over the loss of life in Vietnam. James persistently and unsuccessfully sought to explain the religious nature of the armband to defendants.[10]

Judge Curtin found:

> "...on the basis of the record this court would be inclined to characterize James' act as religious, were such a characterization necessary to the resolution of this case." 385 F. Supp. at 216; Appendix, p. 798a.

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9. James' religious affiliations are set out in detail by Judge Curtin in the Appendix at 802a. 385 F. Supp. at 211, n.2.

10. Unfortunately, defendant Brown insisted upon characterizing it as a "political act against the President", Appendix, pp. 96a; 136a-138a; 554a-558a; and failed to inform the local School Board of the Quaker background of the symbol. Appendix, pp. 554a-558a.

Where, as here, government officials are unable to demonstrate a substantial factual threat to a legitimate state interest, the free exercise clause disables them from penalizing acts of religious conscience. E.g. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

The requirement that the state develop a factual predicate for its actions when they impinge upon religious conscience is illustrated by In re Jenison, 265 Minn. 96, 120 N.W.2d 515, vacated and remanded, 375 U.S. 14, on remand 267 Minn. 136, 125 N.W.2d 588 (1963). In Jenison, a Jehovah's Witness, relying upon a literal reading of the Biblical phrase "Judge not lest ye be judged", declined to serve on a Minnesota jury. The Supreme Court of Minnesota affirmed her conviction for contempt of court, reasoning that the legitimate state interest in securing jurors outweighed Mrs. Jenison's religious scruples. The Supreme Court vacated her conviction and remanded for re-consideration in light of Sherbert v. Verner, 374 U.S. 398 (1963). 375 U.S. 14. On remand, the Minnesota Supreme Court ruled that, unless the state could demonstrate that Mrs. Jenison's religious exemption from jury duty would actually impair

the operation of the jury system, her religious conscience must be respected. Similarly, in this case, the utter failure of defendants to demonstrate that James' armband would actually impair the operation of the educational system disables them from penalizing James for his adherence to religious conscience.[11]

C. The Dismissal Violated James' Due Process Rights

No hearing was afforded James prior to his initial suspension on November 14, 1969; his second suspension on December 12, 1969; or his termination on January 13, 1970. Whether one views James' termination as the destruction of a "property" right (since he was terminated mid-way through the school year despite the existence of a contract) or as the affixing of a badge of infamy (since defendants based their actions on James' allegedly "unethical conduct"), the Supreme Court has ruled that James was entitled to a due process hearing

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11. As Chief Judge Kaufman's original opinion herein recognized, the emphasis on requiring a genuine factual predicate for government action in derogation of First Amendment values runs throughout both the free speech and free exercise elements of this case. However, the traditionally greater deference paid to religious, as opposed to non-religious, conscience, militates in favor of analyzing the religious and non-religious elements of James' armband separately. E.g. Welsh v. United States, 398 U.S. 333 (1970); Wisconsin v. Yoder, 406 U.S. 205 (1972).

at some stage of the proceedings against him. Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

Three points existed at which defendants were constitutionally obliged to have provided James with a procedurally adequate hearing.

First, on November 15, 1969, defendants convened a special meeting of the school board to discuss James' having worn an armband to class the preceding day. Defendants concede that James was neither notified of the meeting nor invited to submit any statement concerning his actions. Defendants also concede that defendant Brown presented a written report on James' activity, which is in evidence. Moreover, defendant Brown conceded under cross-examination that because he deemed James' act "political", he included neither the Quaker roots of the armband nor James' explanation of its religious quality in his report to the Board. Accordingly, the Board was provided with defendant Brown's distorted and erroneous account as its sole source of information.

Second, on December 17, 1969, the Board met to consider James' having worn an armband on December 12, 1969.

Once again James was not notified of the meeting, nor was he provided any alternative opportunity to be heard. Once again, the sole source of information was defendant Brown's distorted version of the events. Once again, acting in partial ignorance of the facts, the Board condemned James' act as political and suspended him indefinitely.

Finally, on January 13, 1970, the Board met to consider terminating James. On this occasion, James, after requesting the information, was notified of the meeting and was informed that if he wished to address the Board he was free to do so, just as any other spectator at a Board meeting. However, defendants, acting on the advice of counsel, explicitly refused to provide minimal procedural safeguards, such as notice of charges or the right to call, confront or cross-examine witnesses. Accordingly, James declined to participate in the absence of minimal procedural safeguards.[12]

Given the degree to which the legal issues in this case turn on an analysis of the facts, the failure of the

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12. At the time James made his decision to insist upon minimal procedures, he was unaware that defendant Brown was feeding the Board incomplete information concerning the "political" as opposed to "religious" basis of the armband.

Board to hold a formal evidentiary inquiry into the armband incident at any stage of its evolution was reprehensibly negligent. Indeed, the possibility that this entire litigation might have been unnecessary had the Board been in possession of all the facts is testimony to the wisdom of the Supreme Court's enunciation of a constitutionally mandated fact-finding hearing in cases such as this. Since no such fact-finding occurred, James' dismissal was constitutionally invalid.

D. The Dismissal Violated James' Equal Protection Rights

When First Amendment rights are involved, the Supreme Court has enunciated a strict "equal access" principle which condemns governmental regulations which discriminate among classes of speech based upon content. E.g. Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972).

As the record makes clear, defendants imposed just such a discriminatory regulation on anti-war communication, while tolerating patriotic or pro-war emblems. Judge Curtin noted:

> "...it is evident that only symbols expressing one side of the war issue were deemed to be a prohibited political act." 385 F. Supp. at 216; Appendix, p. 798a.

Thus, defendants were perfectly prepared to tolerate "Peace with Honor" signs and American flag lapel pins[13]; yet suddenly discovered the high principles of "teacher neutrality" they now claim to uphold only as a post-hoc rationale for punishing speech with which they disagreed.

II. THE COMPUTATION OF DAMAGES BY THE DISTRICT COURT WAS, IF ANYTHING, UNDULY GENEROUS TO THE DEFENDANTS-APPELLANTS

A. Compensatory Damages

A court is authorized pursuant to 42 U.S.C. § 1983 to award compensatory damages to redress the deprivation of constitutional rights. Many courts, in effectuating the policy of § 1983, have sought to place a financial value on the often intangible loss which flows from a violation of a constitutional right. E.g. Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (upholding award for emotional distress caused by violation of First Amendment rights). Indeed, plaintiff-appellee unsuccessfully urged the District Court to adopt such a valuation

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13. It is an unfortunate fact that the wearing of a flag lapel pin in 1969 was equated by many with a statement of support for national policy in Vietnam.

technique and to award compensation for the "intrinsic" damages and psychological loss caused by a denial of First Amendment rights, in addition to providing recovery for out-of-pocket loss. Instead, Judge Curtin utilized a more traditional valuation standard of net out-of-pocket loss of wages to measure the damage award in this case. Given the anguish suffered by the James family as the direct result of defendants' unconstitutional acts, defendants should count themselves fortunate that Judge Curtin adopted so traditional a standard by which to measure James' damages.[14]

B. Pre-Judgment Interest

In addition to awarding back-pay, Judge Curtin granted plaintiff's application for pre-judgment interest from the date each salary payment should have been made.[15]

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14. No dispute exists concerning the propriety of utilizing net back wages, reduced by amounts earned in mitigation, as one possible method of measuring damages in civil rights cases. E.g. Connell v. Higgenbotham, 305 F. Supp. 445 (D.C. Fla. 1969), aff'd in part, rev'd in part, on other grounds, 403 U.S. 207 (1970); Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Gieringer v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973).

15. Although plaintiff sought pre-judgment interest at 7-1/2 per cent compounded annually, Judge Curtin provided for simple pre-judgment interest at 6 per cent. It appears that the correct figure should be 7-1/2 per cent, simple interest. Kaufman v. Chase Manhattan Bank, 370 F. Supp. 279 (S.D.N.Y. 1974).

Appellants contend, first, that no pre-judgment interest should have been allowed and, second, that an artificial 3 per cent ceiling should have been observed in favor of all defendants. Judge Curtin explicitly rejected both contentions. Appendix, pp. 855a-859a.

In granting pre-judgment interest, Judge Curtin noted that in actions under 42 U.S.C. § 1983 "both federal and state rules on damages may be utilized, whichever better serves the policies of the federal statutes." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969). He noted that New York explicitly provides for pre-judgment interest in connection with sums "awarded...because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property..." C.P.L.R. § 5001 (McKinney 1963). Since the Supreme Court had ruled in Roth and Sinderman that firing a teacher for First Amendment activity midway through a contract would be an interference with a "property" right, Judge Curtin applied the clear meaning of § 5001 and granted pre-judgment interest.[16] Judge Curtin noted, however, that § 3-a(1) of

16. For New York cases on the award of pre-judgment interest, see, e.g. Flamm v. Noble, 296 N.Y. 262, 72 N.E.2d 886 (1947) (pre-judgment interest essential to complete indemnity); Matter of Kavares, 29 A.D.2d 68, 285 N.Y.S.2d 983 (1st Dept. 1967) (pre-judgment interest an element of compensation for

(continued)

of the General Municipal Law provides a 3 per cent ceiling in actions against certain governmental entities, including school boards.[17] Accordingly, Judge Curtin awarded pre-judgment interest against the Board at 3 per cent, while

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delayed payment); In the Matter of D. v. O., 77 Misc. 2d 938, 355 N.Y.S.2d 283 (1972) (Family Court, New York Co.) (per. Dembitz, J.) (granting pre-judgment interest on support payment from date each became due). Defendants-appellants argued below that the decision of one New York trial court denying pre-judgment interest to a reinstated teacher precluded Judge Curtin from advancing the policies of § 1983 by awarding pre-judgment interest. Gordon v. Board of Education, 52 Misc.2d 175, 274 N.Y.S.2d 543 (Kings Co. 1966). However, Judge Curtin recognized that Gordon was distinguishable on at least three levels. First, Gordon was decided six years prior to the recognition by the Supreme Court in Roth and Sinderman that a wrongfully discharged teacher had suffered a classic deprivation of property, thus triggering the language of § 5001 CPLR. Second, in Gordon, the court found that the primary purpose of the Article 78 proceeding was equitable reinstatement; while in James, the sole relief sought is damages. Finally, Gordon involved a mere exercise of discretion as to whether pre-judgment interest should be awarded. Even if one assumes the Gordon court was correct in deciding that it possessed such discretion (a highly questionable assumption), Judge Curtin clearly possessed a like discretionary power to award pre-judgment interest.

17. Although it is of only academic interest in this case, it is questionable whether an unreasonably low state ceiling on interest rates could prevent a Federal judge from effectuating the policies of the Civil Rights statutes by awarding realistic interest.

recognizing that the individual defendants, although acting under color of state law, were not entitled to be treated as if they were governmental entities. E.g. Monroe v. Pape, 365 U.S. 167 (1961); Scheuer v. Rhodes, ___U.S.___ (1974).[18]

In carefully weighing New York law on pre-judgment interest, Judge Curtin advanced the policies of the Civil Rights Act and implemented, with scrupulous care, the rulings of this Circuit on New York pre-judgment interest. E.g. Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973); Julien J. Studley, Inc. v. Gulf Oil Corp., 425 F.2d 947 (2d Cir. 1969).

Given the traditional "back-pay" standard utilized by the District Court in fixing plaintiff's damages, the court's recognition that those unpaid wages should accrue interest from the date each was due and payable is nothing more than elemental fairness.

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18. The issue of whether contribution on pre-judgment interest may be obtained by the individual defendants despite the 3 per cent ceiling imposed by the General Municipal Law remains unsettled. Jones v. All Boro Car Leasing, 67 Misc.2d 567, 325 N.Y.S.2d 535 (Civil Ct. 1971).

III. THE AWARD OF REASONABLE ATTORNEYS' FEES TO COUNSEL FOR PLAINTIFF-APPELLEE WAS ENTIRELY APPROPRIATE

A. The Award of Attorneys' Fees in 1983 Litigation

The power of a Federal District Court in this Circuit to award reasonable attorneys' fees in an appropriate § 1983 case is no longer open to question. E.g. Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973). See generally, Nussbaum, Attorneys' Fees in Public Interest Litigation, 48 NYU L. Rev. 301 (1973); Note, Awarding Attorneys' Fees to the Private Attorney General: Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733 (1973); Comment, Court Awarded Attorneys' Fees and Equal Access to the Courts, 122 U. of Pa. L. Rev. 632 (1974).

Attorneys' fees in civil rights cases have been justified on at least three bases. First, since many § 1983 actions have the effect of vindicating the constitutional rights of large numbers of persons, a plaintiff in the appropriate case may be perceived as a private attorney-general who has conferred a public benefit upon substantial segments of the population, thus meriting an award of

counsel fees. E.g. Hall v. Cole, 412 U.S. 1 (1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), aff'd on other grounds, 503 F. 2d 1305 (5th Cir. 1974) (issue of attorneys' fees reserved). See generally, Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). Second, since defendants in civil rights litigation have occasionally proven obdurate in failing to recognize the existence of constitutional rights, courts have awarded counsel fees in recognition of the increased difficulty of prosecuting a civil rights action under such circumstances. E.g. Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) aff'd mem. sub. nom., Amos v. Sims, 409 U.S. 942 (1972). Finally, and most importantly, courts have recognized the importance of insuring that adequate counsel be available to persons whose constitutional rights have been violated and have recognized that, unless reasonable counsel fees were available in appropriate cases, members of the bar would find it impossible to undertake the often complex and demanding task of shepherding a § 1983 case to a successful conclusion. E.g. Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973). Whether one views counsel fees in this case under a "private attorney general-public benefit" theory; an "obdurate defendant " theory or from the perspective of encouraging

adequate counsel in future civil rights cases, Judge Curtin's exercise of his discretionary power to award counsel fees was clearly correct.[19]

B. The Receipt of Attorneys' Fees by the American Civil Liberties Union Foundation

1. Attorneys' Fees in "Pro Bono" Cases

Since representation in this matter was provided by the American Civil Liberties Union, any counsel fees awarded by the Court would be payable to the American Civil Liberties Union Foundation in order to facilitate the

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19. When this court granted an expedited hearing at appellee's request, counsel notified the District Court of the imminence of the appellate hearing and asked leave to defer evidentiary proceedings on the amount of counsel fees pending this appeal. This litigation has consumed four years, during which five motions have been argued in District Court; two appeals have been taken to this court; a certiorari petition has been contested; and a three day trial has taken place; to say nothing of extensive discovery, negotiation and research. The fixing of an appropriate hourly compensation rate and the determination of a final fee await Judge Curtin's attention on remand. No reason exists, however, to delay payment of James' back-wages pending final resolution of the amount of reasonable attorneys' fees in this case. Indeed, counsel wishes to inform the Court that, if it believes the issue of attorneys' fees will further delay the receipt of James' back-wages, counsel is prepared to waive counsel fees. However, counsel perceives no reason why James' back pay should not be paid forthwith. Counsel also wishes to make it clear that the sole reason for not having proceeded immediately in the District Court to set a fixed fee was counsel's desire to expedite the appeal on the back-wages owed James.

availability of adequate ACLU counsel in future constitutional litigation.[20] The award of counsel fees to privately supported civil rights groups engaged in providing adequate counsel to persons whose constitutional rights have allegedly been violated has been consistently affirmed. E.g. Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974)(ACLU); Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973) (attorneys' fees to NAACP); Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970) (NAACP) Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970) (NAACP); La Raza Unida v. Volpe, 57 F.R.D. 94, 98 n.6 (N.D. Cal. 1972) (Public Advocate); Sims v. Amos, supra, (ACLU); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974).

2. The Effect of New York Law

In an effort to avoid the consequences of their refusal to abide by the clear command of this Court in James v. Board of Education, 461 F.2d 566 (2d Cir. 1972), defendants mistakenly allege that the ACLU has not complied with Section 495 of the Judiciary Law, which regulates the offering of legal services in New York State by non-profit organizations. In fact, however, the ACLU Foundation (the

20. The relationship between counsel and the ACLU is detailed in the Appendix at pp. 848a-850a.

tax-exempt arm of the ACLU) has, since the enactment of § 495, been fully in compliance with its registration provisions. The current certificate authorizing the ACLU Foundation to offer legal services in New York State and to receive court-awarded fees is set forth in the Appendix at pp. 837a-838a.[21] Moreover, as Judge Curtin noted, it can hardly be the law that the Federal policy of awarding attorneys' fees in certain cases involving Federal constitutional rights can be made to depend upon a state grant of permission to engage in civil rights litigation. Aspira of New York, Inc. v. Board of Education of the City of New York, 72 Civ. 4002 (S.D.N.Y. Jan. 2, 1975) (awarding attorneys' fees to Puerto Rican Legal Defense Fund despite non-registration under § 495).

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21. Defendants apparently continue to misunderstand the relationship of the New York Civil Liberties Union to the ACLU Foundation. NYCLU is the New York State branch of the ACLU. All legal services provided by the ACLU, or any of its state branches, are provided under the ultimate auspices of the ACLU Foundation. During the four years which this case has been in the courts, counsel has functioned as an NYCLU staff counsel, Assistant Legal Director of the ACLU and an ACLU-NYCLU volunteer attorney. At all times, however, counsel has operated under the general auspices of the ACLU Foundation, to which all fees would be payable herein. The internal structure of the ACLU is described in the Appendix at p. 850a.

IV. NO PROCEDURAL OBSTACLES EXIST TO THE ENFORCEMENT OF THE JUDGMENT OF THE DISTRICT COURT[22]

A. Enforcement of Back-Pay Award Against the School Board

1. Cause of Action and Jurisdiction

If the Addison School Board is deemed a "person" within the meaning of 42 U.S.C. § 1983, a cause of action for damages within the jurisdiction[23] of the District Court will be established. In Monroe v. Pape, 365 U.S. 167 (1961) and City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Supreme Court ruled that municipal corporations were not "persons" within the meaning of the Civil Rights Act of 1871. However, the rationale for construing "person" to exclude municipal corporations, which were broadly immune from litigation in 1871, would appear inapplicable to school boards, which were suable at the time the Civil Rights Act was adopted. Accordingly, school boards have been deemed "persons" for the purposes of § 1983 on numerous occasions.

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22. Although defendants have not urged the existence of certain procedural bars to the enforcement of the District Court judgment, counsel believes that ethical considerations compel appellee to inform the court of the potential issues. Accordingly, counsel has, after consultation, been directed by appellee to inform the Court of the issues raised herein. Nevertheless, counsel is troubled by the apparent conflict between the duty to represent one's client and an ethical obligation to raise potentially damaging legal issues not addressed by an opposing party.

23. Jurisdiction would be granted under 28 U.S.C. § 1343(3).

Moreover, even if one were to exclude school boards from the scope of § 1983, a cause of action for the violation of James' constitutional rights would flow directly from the First Amendment, just as the Fourth Amendment generates its own cause of action for damages. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).[24] See also, James v. United States, 358 F. Supp. 1381 (D.R.I. 1973); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973). Under similar circumstances this Court has recognized that the Constitution generates causes of action against government entities. Brault v. Town of Milton, ___ F.2d____ (2d Cir. February 25, 1975). In Brault, this Court recognized a Fourteenth Amendment cause of action against a municipality, which would not otherwise have been amenable to suit in Federal court. Similarly, James' First Amendment cause of action, coupled with Federal question jurisdiction under 28 U.S.C. § 1331(a), renders the Addison School Board amenable to a suit for damages in a Federal court.

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24. The jurisdictional analogue of an independent First Amendment cause of action would be 28 U.S.C. § 1331(a). At the close of trial, plaintiff explicitly moved to add 28 U.S.C. § 1331(a) as a jurisdictional vehicle to support the Bivens cause of action. Appendix, p. 775a.

2. Defenses

The Addison School Board is a fully suable local entity, responsible for its own debts, which levies local property taxes to support its operations. Accordingly, as a local governmental unit, it cannot claim immunity from a suit for damages in Federal court under the Eleventh Amendment. E.g. Charles Simkin & Sons, Inc. v. State University Construction Fund, 352 F. Supp. 177 (S.D.N.Y. 1973, aff'd 486 F.2d 1393 (2d Cir. 1973); George R. Whitten, Jr., Inc. v. State University Construction Fund, 493 F.2d 177 (1st Cir. 1974); Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961); Prendergast v. Long Island State Park Commission, 330 F. Supp. 438 (E.D.N.Y. 1970); Matherson v. Long Island State Park Commission, 442 F.2d 566 (2d Cir. 1971); Raymond International, Inc. v. M/T Dalzelleagle, 336 F. Supp. 679 (S.D.N.Y. 1971).

B. Enforcement of the Judgment Against the Individual Defendants

1. Cause of Action and Jurisdiction

No serious question can be raised concerning the existence of a cause of action for damages under 42 U.S.C. § 1983 against individual defendants who, acting under

color of their official positions, deprive a plaintiff of Federal constitutional rights. E.g. Monroe v. Pape, 365 U.S. 167 (1961).

2. Defenses

Individual defendants who act under color of their offices are, of course, not entitled to claim governmental or sovereig immunity from a civil rights action. E.g. Scheuer v. Rhodes, ___U.S.___ (1974). Moreover, to the extent any possibility of urging an affirmative defense of good faith and probable cause existed herein, defendants waived it, pursuant to Rule 8(c) F.R.C.P., by failing to assert it in the District Court. E.g. Huffman v. Pursue, Ltd., ___U.S.___, 43 U.S.L.W. 4379, n. 19 (March 18, 1975). See generally, Green v. James, 473 F.2d 660 (9th Cir. 1973); Pan Am Tankers v. Vietnam, 291 F. Supp. 49 (S.D.N.Y. 1968); Aerotrade v. Republic of Haiti, 376 F. Supp. 1281, 1283 n. 7 (S.D.N.Y. 1974). Of course, under the standards established by Wood v. Strickland, ___U.S.___, 43 U.S.L.W. 4293 (February 25, 1975), defendants could never have qualified for an affirmative good faith defense even if one had been timely asserted.

CONCLUSION

For the reasons stated herein, the award of back-pay to the plaintiff-appellee, together with appropriate pre-judgment interest, costs and attorneys' fees, should be affirmed forthwith.

Respectfully submitted,

*

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*The assistance of Judith Resnik, a fellow in the Arthur Hays Garfield Program, in the preparation of this brief is gratefully acknowledged.

AFFIDAVIT OF SERVICE

JUDITH RESNIK, being duly sworn, deposes and says:

1. I am over 21 years of age and a resident of New York and am not a party to this action.

2. On April 4, 1975, I served the within Brief of Appellee and Appendix to the Brief of Appellee on Harry Treinin, Esq., Attorney for defendants-appellants, by depositing three true copies of each, wrapped in a securely fastened postage paid wrapper, in a Federal mail depository under the custody and control of the United States of America addressed to:

Harry Treinin, Esq.
11 East Market Street
Corning, New York 14830,

said address being designated for the receipt of papers herein.

Judith Resnik
Judith Resnik

Sworn to before me this 4th day of April, 1975

Laura Sager

LAURA SAGER
NOTARY PUBLIC, State of New York
No. 31-4506756
Qualified in New York County
Commission Expires March 30, 1977